Supreme Court, U.S.
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No. 96-1060

In The

Supreme Court of the United States

October Term, 1996

LORELYN PENERO MILLER,

Petitioner,

v.

MADELEINE K. ALBRIGHT,
Secretary of State
of the United States,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER

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PETITIONER'S REPLY BRIEF

ARGUMENT

This Court specifically identified the parameters of the original grant of *certiorari*, 65 USLW 3726 (April 29, 1997) with a clarification which stated:

> The petition for a writ of certiorari is granted limited to the following question: Is this distinction in 8 U.S.C. §1409(a) between "illegitimate" children of U.S. citizen mothers and "illegitimate" children of U.S. citizen fathers a violation of the Fifth Amendment question to the United States Constitution? 65 LW 3753 (May 13, 1997).

This Court granted certiorari in this case on one issue only: Whether the gender discrimination in 8 U.S.C. §1409 violates the Constitution. Respondent is unable to defend the gender based distinctions in that statutory provision, and instead focuses on other issues. The portions of respondent's brief which deal with the justification for the gender based discrimination at issue fall back on gender based stereotypes, clearly demonstrating the need to invalidate the distinction.

In reply, petitioner addresses respondent's allegations aimed at preventing the Court from looking directly at the gender discrimination at issue and then demonstrate that respondent's defense of the statutory provision is itself based on improper assumption about gender distinctions.

I. THE CONSTITUTION APPLIES TO THIS CASE

A. The Court Should Not Consider The Government's New Argument That Was Not Raised Below

The Government contends that the judgment below should be affirmed because Ms. Miller "has no substantive rights cognizable under the Fifth Amendment." Resp. Br. at 11-12. This argument was not raised below and should not be considered for the first time by this Court. In the courts below, the Government contended that Section 309(a) passed constitutional muster under the deferential standard applied by this Court in *Fiallo v. Bell*, 430 U.S. 787 (1977), but never argued that Ms. Miller had no Fifth Amendment rights at all. Nor did the Court of Appeals consider this point on its own. A respondent is entitled to raise only those arguments "appearing in the record." *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). The Court should continue to decline to entertain arguments the Court below had no chance to consider. See *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-552 n.2 (1990).

B. Ms. Miller Has Constitutional Rights

If the Court were to consider the argument the Court should reject it. The Government must abide by the Constitution regardless of whether its actions affect persons who live within our borders or abroad. The cases cited by the Government hold only that certain constitutional claims raised by aliens are subject to narrow judicial review in certain circumstances; the cases do *not* hold that

the Constitution does not apply at all to aliens residing abroad.

In fact, *Fiallo v. Bell*, 430 U.S. 787 (1977) is a complete answer to the contention that Ms. Miller has no constitutional rights. The Court expressly noted there is a "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens . . . " 430 U.S. at 793 n.5. While the statute in that case was subject "only to limited judicial review," it was not true that "the Government's power in this area [*i.e.*, immigration] is never subject to judicial review." *Id.* at 796 n.6. Thus aliens have constitutional rights. Even an alien is a "person" within the meaning of the Fifth Amendment. See *Plyler v. Doe*, 457 U.S. 202, 210 (1982). ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term").[1]

In the most recent of the cases, affirming that aliens do have constitutional rights, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court held that the Fourth Amendment did not prohibit a search by government agents abroad, but clarified that the Fourth Amendment "operates in a different manner than the Fifth Amendment, which is not at issue in this case." *Id.* at 264.

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[1] Under the Government's theory, Congress apparently could decide that only white children born abroad of citizen parents may become citizens, and the Constitution would have nothing to say about the decision. This scenario is not so far removed from this case, where Ms. Miller is not entitled to citizenship solely because she was born of a citizen father, rather than a citizen mother. The Court should not declare the Constitution inapplicable to such decisions.

Indeed, Justice Kennedy wrote separately to emphasize that "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic". Justice Kennedy made it clear that the Court [did] not decide [ ] . . . that persons in the position of the respondent have no constitutional protection" *Id.* at 278. To the contrary, he stated "all would agree" that the alien Defendant was protected by the Due Process Clause of the Fifth Amendment. *Id.*

Ms. Miller is not merely an alien seeking admission to the United States; she is the daughter of an American citizen pressing a claim that she is entitled to the same citizenship test Congress has *determined* is appropriate for children of citizen mothers. Contrary to the Government's contentions, the Court has never held that the Due Process Clause is inapplicable to such a claim. It should not do so now.

C. Ms. Miller May Raise The Rights Of Her Citizen Father

The Government is also wrong to contend that Ms. Miller lacks standing to raise the constitutional rights of her citizen father. See Resp. Br. at 11 n.2. A party is entitled to raise the rights of third parties if (1) the litigant has "suffered an 'injury in fact,' giving a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) the litigant has "a close relation to the third party"; and (3) there is "some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio,* 499 U.S. 400, 411 (1991) (citations omitted).

The Government does not dispute Ms. Miller has suffered an "injury in fact" giving her a "sufficiently concrete interest" in the outcome of this case, nor that Ms. Miller and her father have the requisite "close relation" to each other.

Instead, the Government only disputes the existence of a "hindrance" to petitioner's father's assertion of his own rights. However, Mr. Miller was unable to assert his own rights because upon the Government's own motion, he was denied standing to litigate them.

The Government, however, contends Mr. Miller was not hindered in the assertion of his rights because he "could have remained a party by appealing from the order dismissing him as a plaintiff." Resp. Br. at 11 n.2. This is unfair, if not hypocritical. Contrary to the Government's assertion the District Court "essentially rejected [Miller's,] claim on the merits", *Id.*, the Court's opinion makes clear Mr. Miller's case was dismissed not on the merits, but rather for lack of standing because his "pleadings assert no cognizable injury . . . " Resp. Br. at 11a.[2]

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[2] In opposing the Government's motion to dismiss for lack of standing, Mr. Miller relied on *Wauchope v. U.S. Department of State,* 985 F.2d 1407 (9th Cir. 1993), which had distinguished this Court's decision in *Fiallo* on the merits of the constitutional question presented here. The District Court, however, held that even if *Wauchope* was compatible with *Fiallo,* Mr. Miller would still lack standing because the plaintiffs in *Wauchope* "had established standing by asserting their own legal injury as a result of being denied citizenship" while the plaintiffs' parents "were not parties to the action." Resp. Br. at 10a-11a. Thus, according to the court, "Mr. Miller's pleadings assert no cognizable injury, even under the reasoning adopted in *Wauchope.*" *Id.*

Having successfully contended below that Mr. Miller lacked standing because his interest in seeing his daughter recognized as a citizen was not a cognizable injury for purposes of Article III, the Government now contends Mr. Miller suffered no hindrance to the assertion of his rights. Mr. Miller's dismissal was at the very least a "hindrance," and one the Government itself deliberately and successfully brought about. Ms. Miller therefore meets all three criteria for raising her father's constitutional rights.

II. *FIALLO* DOES NOT GOVERN PETITIONER'S CITIZENSHIP CLAIM

Respondent next seeks to save the gender based classification at issue by arguing that cases addressing the rights of aliens in the realm of entry or expulsion dictate the standard of review applicable to Ms. Miller's claim of citizenship. See Resp. Br. at 21-23, 34.

None of the cases Respondent cites concern the claim of citizenship-at-birth that Ms. Miller raises. The Government is unable to cite such a case because this Court has never applied the deferential *Fiallo* standard of review to a citizenship claim, especially when gender stereotyping is the basis for a discriminatory denial of citizenship. In any event, the Court's rulings in *Landon v. Plasencia*, 459 U.S. 21 (1982) – which imposed constitutional scrutiny based on the alien's *ties* to the United States notwithstanding her location – and *Rostker v. Goldberg*, 453 U.S. 57 (1981) – which applied heightened scrutiny in an area where the deference due Congress is equal, if not greater

than, the deference due in the immigration context – supersede the Government's reliance on *Fiallo*.

First, the determination of who is a citizen in the first instance is entirely different from a claim by an individual who acknowledges her alienage but seeks the "right" to immigrate. See Pet. Br. at 9; Ami. Br. at 19-20; *Wauchope v. U.S. Department of State*, 985 F.2d 1407, 1414 (9th Cir. 1993). Petitioner's claim is distinct from cases challenging a naturalization requirement or demanding judicial naturalization. The INA establishes three distinct methods of acquiring U.S. citizenship: (1) by birth in the United States, (2) by naturalization; and (3) by birth abroad to U.S. citizen parent(s). Gordon, Mailman, and Yale-Loehr, *Immigration Law and Procedure*, §93.01[5][a] (Rev. Ed. 1997). The Act embodies the fundamental difference between the eventual naturalization of a person who was – indisputably – an alien, and the status of an individual who is born a citizen. Naturalization is the "conferring of nationality of a state upon a person **after birth,** by any means whatsoever," INA §101(a)(23) (emphasis added), whereas the petitioner and others born abroad to a U.S. citizen are "nationals and citizens of the United States **at birth**." INA §301 (emphasis added). Unlike a person seeking to naturalize or immigrate, Ms. Miller seeks to establish her U.S. citizenship by virtue of her birth.[3] The

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[3] Neither *Wong Kim Ark*, 169 U.S. 649 (1898) nor *Rogers v. Bellei*, 401 U.S. 246 (1978) require or authorize extending the rationale of Fiallo to Ms. Miller's claims. In *Wong Kim Ark*, the Court considered the rights of children born in the United States and invalidated Congress' denial of citizenship. The Court's *dicta* in *Wong Kim Ark* equating naturalization with conferral of citizenship through birth, Resp. Br. at 39, is inconsistent with

deference afforded Congress' power over admissions of aliens is inapplicable to a person who claims she has been denied citizenship solely in violation of her right to equal protection.

Second, *Landon v. Plasencia,* which this Court decided after *Fiallo,* holds that the critical inquiry for Ms. Miller are her *ties* to this country. 459 U.S. at 31. In *Landon,* legal permanent residence status was sufficient to trigger due process safeguards notwithstanding the "firmly embedded" (Resp. at 23 (citing *Fiallo*)) deference to congressional decisions. Ms. Miller has even stronger ties to the United States than Plasencia – a claim of citizenship at birth because she was born to a U.S. citizen. That relationship, which the Government does not dispute, provides a tie to this country that must allow her to invoke the heightened level of constitutional scrutiny required of legislation that discriminates based on gender stereotypes.[4]

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modern notions of naturalization and inapplicable to Petitioner. See *Immigration Law and Procedure,* §93.01[5][a]. *Rogers v. Bellei* concerned the power of Congress to impose a *non-discriminatory* condition subsequent requiring a period of residency in the United States for a person born abroad to maintain U.S. citizenship. The Court stressed that since Congress could adopt the greater restrictions of eliminating citizenship for children born abroad altogether, that the lesser condition subsequent was permissible *Id.* at 835. The logic that the power of the greater includes the power of the lesser does not, of course, permit a discriminatory denial of benefits.

[4] Applying heightened scrutiny in this case does not "confer rights on all the world as third party beneficiaries." Resp. Br. at 23. Petitioner is not random, unconnected third party, but an individual belonging to a limited class, i.e., those born to a U.S. citizen parent, that Congress has recognized has ties to the United States.

Recognition of Petitioner's blood tie to her U.S. Citizen father to facilitate unity of citizen families does not jeopardize or undermine this country's tradition of *jus soli.* Despite Respondents' contention that *jus soli* is this Nation's one and only "fundamental rule of citizenship," Resp. Br. at 13, conferral of citizenship by descent, or *jus Sanguis,* has had as long and legitimate a history, beginning with the First Congress in the Act of March 26, 1790, as the constitutionally mandated *jus soli,* 1 Stat. 103, 104. See *Immigration Law and Procedure,* §93.01[3]. While the precise parameters of *jus sanguis* have evolved with time, the ability to pass on U.S. citizenship at birth from parent to child for at least one generation, has been guaranteed since the founding of the nation. The only contemporary exception to that principle is the gender-based discrimination at issue here.

Third, this Court has made clear in another post-*Fiallo* decision, *Rostker v. Goldberg,* 453 U.S. 57 (1981), that even with the enormous deference due Congress in the exercise of its sovereign power over national security and foreign affairs, the heightened scrutiny standards of the Equal Protection Clause cannot be ignored. As Amici discussed in detail, *Rostker* shows, like national security matters, immigration decisions by Congress cannot be insulated from heightened scrutiny standards merely by invoking the deferential description this Court has given to Congress' immigration power. Ami. Br. at 15-17. The *Rostker* Court applied heightened scrutiny, despite judicial deference to Congressional judgments in the military context, because the policy at issue there, as here, discriminated on the basis of gender. *Id.* at 69-72.

Congress could, if it chose, eliminate citizenship to children born abroad to **all U.S. citizens** consistent with the Fourteenth Amendment. But once Congress confers citizenship on **some** children based on their descent from **some** citizen parents, Congress may not deny the same right to other children based on discriminatory criteria. The antiquated notions of legitimacy and parenthood embodied in §309(a) cannot be saved by reference to Congress' "immigration" or "naturalization" power.

III. UPON A FINDING THAT A U.S.C. §1409 IS UNCONSTITUTIONAL, THE COURT CAN REMEDY THE DISCRIMINATION AGAINST PETITIONER

In the last ditch effort to save the statutory provision at issue, respondent's attempt to make the question of remedy more complicated than it is. Respondents argue that (1) this court cannot redress plaintiff's injury because it cannot confer citizenship under Section 301(g), and (2) that remedial expansion of Section 309's terms is inappropriate. They are wrong on both counts.

A. The Court Of Appeals' Holding That The Federal Court Has The Power To Strike Down Section 309(a) As Unconstitutional And Order Section 301(g) To Apply Must Be Upheld.

Whether a Federal court can order relief if the provision at issue is found unconstitutional was already addressed by the Court of Appeals, which found that it could. The D.C. Circuit held:

> Ms. Miller did not request the court to grant her citizenship; rather, she requested that the court declare section 1409(a) unconstitutional and merely make a finding under the general rule applicable to persons born outside of the United States, 8 U.S.C. §1401(g) [Section 301(g)]. . . . We agree with Ms. Miller that, if the district court had held section 1409(a) [Section 309(a)] unconstitutional, it could have found that she was a U.S. citizen pursuant to section 1401(g) [Section 301(g)]. Such a finding would not have violated Pangilinan's [*INS v. Pangilinan*, 486 U.S. 875 (1988)] proscription on the exercise of judicial equitable power to confer U.S. citizenship in this absence of legislative authority. 96 F.2d at 1470 (D.C. Cir. 1996).

The Court of Appeals' holding on this issue should be affirmed.[5]

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[5] In addition, respondent's arguments on this point are not properly before the Court. Although explicitly decided by the D.C. Court of Appeals, respondent failed to file a cross-petition on this issue and the question was not part of the grant of certiorari. It is well-settled that a prevailing party may defend favorable judgment without filing a cross-petition only where that party "seeks to preserve, and *not to change* that judgment." *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994) (emphasis supplied). A cross-petition is necessary even where the respondent seeks to raise an argument that would result in *less* relief than was granted to the respondent below. See *FERC v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1976) (where court of appeals had invalidated license fees in their totality, in absence of cross-petition respondent could not raise alternative argument that would have resulted in invalidation of only a portion of the fees); see also *Granfinanciers, S.A. v. Nordberg*, 492 U.S. 33, 40 (1989).

This rule applies with full force here. The Court of Appeals rejected petitioner's contention that Section 309(a) is

It is no wonder that respondents attempt in a convoluted way to argue that Section 301 does not apply since that provision makes it clear that Congress' general intent was to confer citizenship of children born to one and only one citizen parent. As Section 301 states:

> The following shall be nationals and citizens limits of the United States at birth: . . .
>
> (g) a person born outside the geographical limits of the United States and its outlying possessions of *parents* one of whom is an alien, and the other citizen of the United States . . .
>
> (emphasis supplied).

That provision does not limit the definition of parent to married parents. Indeed, Section 309, the provision at issue in this lawsuit provides that Section 301 applies generally to out-of-wedlock children, and out-of-wedlock children of citizen mothers become citizens in much the same way as do children with married parents under Section 301. If the differential way the provision applies to children of citizen fathers as opposed to children with citizen mothers is unconstitutional, the appropriate remedy is to strike down Section 309 and apply Section 301 as

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unconstitutional, but also rejected respondent's contention that the court had no authority to order the requested relief. Respondent now attacks that latter holding, arguing that even if petitioner is entitled to a declaratory judgment that the statute is unconstitutional, this Court may not order that citizenship be conferred upon her. If successful, however, that argument would not merely *preserve* the judgment, resulting in an alteration of the rights established under it. Without a cross-petition seeking review of that question, the Court cannot consider it.

it is applied to all children born abroad of one citizen parent. Take Section 309(a) away, and the statutory scheme in sections 301 and 309 are harmonious in conferring citizen status on all children born abroad of one citizen parent. Thus, the statutory language and statutory scheme support the holding of the Court of Appeals that relief can and should be granted to petitioner if Section 309 is unconstitutional.

B. Remedial Expansion Is The Appropriate Remedy In This Case.

This Court has consistently remedied equal protection violations by extending benefits to excluded classes rather than withdrawing them.[6] As stated in *Califano v. Westcott*, 433 U.S. 76, 89 (1979): "In previous cases involving equal protection challenges to under inclusive. . . . statutes, this Court has suggested that extension, rather than nullification, it the proper course."[7]

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[6] The only exception to this general rule has been in cases where this Court has held a state statute unconstitutional under which circumstances the Court has shown an understandable reluctance in the interests of federalism to impose its interpretation of remedy and has instead sent the case back to the state courts for a remedy determination. See *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989); *Wengler v. Druggists Mutual Insurance Company, et al.*, 446 U.S. 142 (1980).

[7] See e.g., *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 691 and n. 25 (1973) (plurality opinion) . . . *Califano v. Goldfarb*, 430 U.S. 199 (1977), *aff'g*, 396 F. Supp. 308, 309 (E.D.N.Y. 1975); *Califano v. Silbowitz*, 430 U.S. 924 (1977), *summarily aff'g*, 397 F. Supp. 862, 871 (S.D. Fla. 1975); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975), *aff'g*, 367

Here, the statutory scheme clearly supports use of the simpler test for all children born abroad of one citizen parent. The appropriate remedy is to strike down the offending provision and order the provisions of section 301(g) and 309(c) to apply to the citizenship determination of petitioner.

IV. THE GOVERNMENT'S DEFENSE OF THE GENDER-BASED DISTINCTIONS AT ISSUE HERE RESTS ON IMPERMISSIBLE AND OVERBROAD GENDER STEREOTYPES, UNDERSCORING THE UNCONSTITUTIONALITY OF SECTION 1409(a)

When the issue of whether the gender based distinctions in Section 309 are constitutional are finally addressed, the arguments the respondent makes are largely based on the types of archaic and stereotypic notions which the Court has refused to accept in cases such as *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) and *U.S. v. Virginia*, 116 S.Ct. 2264 (1996). Such grounds fall far short of establishing even a "rational basis" for Section 309(a) differential treatment of men end women, much less passing muster under the heightened scrutiny applicable here. See *United States v. Virginia*, 116 S.Ct. 2264 (1996); Pet. Br. at 10, 21-24; Amici Br. at 14, 20-22.

F. Supp. 981, 991 (D.N.J. 1973); *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), *aff'g*, 345 F. Supp. 310, 315-6 (D.D.C. 1972); *Richardson v. Griffin*, 409 U.S. 1069, *summarily aff'g*, 346 F. Supp. 1226, 1237 (Md. 1972). "(Cross cites deleted). Although these cases have generally involved government benefits, identical reasoning applies to the question of whether to grant remedial expansion or constriction of the statutes at issue.

In attempting to justify the requirements of Section 309(a), the Government suggests Congress was motivated by the twin concerns of ensuring (1) an application for citizenship be based on a "genuine tie to the United States," Resp. Br. at 24, rather than a "mere blood relationship between the citizen parent and out-of-wedlock child," Resp. Br. at 18; and (2) a financial support obligation can be enforced against the citizen parent. Resp. Br. at 25. But the government never explains how these concerns justify the gender discrimination Congress relied on to advance the concerns.[8]

For example, to meet the requirement of showing more than a "mere blood relationship," a father must establish paternity prior to the child's 18th birthday, must formally agree to support the child financially until age 18, and must have resided in the United States for five years prior to the child's birth (including at least 2 years after age 14). Only then, asserts the Government, will the citizen father and child be "in a position roughly equivalent to that of the typical foreign-born child claiming through an unmarried citizen mother." Resp. Br. at 24. A

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[8] That gender stereotypes underlie these immigration provisions is not surprising. Indeed, the history of Section 1409(a), set out in the Resp. Br. at 15.18 n.7, chronicles the shift from the 1790 formulation of the law, establishing fathers as the sole conduit for nationality, to the 1934 (and current) regime, which posits mothers as the transmitters of culture and national ties. See also Janet Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 San Diego L. Rev. 593 (1991) and Gary Endelman and Bill Coffman, *The Changing Face of Equal Protection: Gender Bias in U.S. Citizenship Law*, Immigration Briefings, March 1995, 1 (describing history of gender-based immigration laws).

citizen mother, in contrast, need simply give birth to the child, and have previously resided for one year in the United States. She need not demonstrate that she established a certain relationship with the child by a certain date, or an ability or willingness to support the child.

The Government argues, based solely on stereotypes and without benefit of any data that these differential requirements are justified because, in addition to the mother's "established legal relationship with her child from the moment of birth," Resp. Br. at 24, the mother will "normally" be legally responsible for the child's support during minority, *Id.*; she will "typically" have custody of the child, *Id.* at 25, 33; and she is "sufficiently likely . . . to have a substantial personal relationship that there is no need to require further evidence of early and significant ties" to the United States. Resp. Br. at 29, 33. Because these mothers' "norms" are not "typical" of fathers, the Government asserts, the law must always pose additional requirements on fathers beyond those imposed on mothers.

The Government equates custody, support, and ties to the United States with motherhood – without requiring proof of any of these factors. There is clearly no direct or inherent relationship between these elements and the sex of the citizen parent. As set out at length in Petitioner's initial brief and the brief of Amici, men and women are similarly situated with respect to their ability to serve as good parents. Pet. Br. at 23-24; Amici Br. at 7-12. Under the most charitable interpretation, the Government's rationales are generalizations based on "administrative convenience" of the type squarely rejected in *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) ("any statutory

scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands dissimilar treatment for men and women who are . . . similarly situated,") (emphasis in original; citing *Reed v. Reed*, 404 U.S. 71 (1971)). More likely, these generalizations rest on, and perpetuate, invidiously discriminatory stereotypes that have been repeatedly condemned by this Court and limit the potential of both men and women. Amici Br. at 10-12.

Moreover, the generalizations on which the Government bases its defense of Section 309(a) are demonstrably overbroad. For example, the Government asserts "an illegitimate child typically remains in the custody of the mother." Resp. Br. at 25. Since 1970, however, the number of single-parent families headed by males in the United States (3.2 million in 1995) has grown far more rapidly than female-headed families. United States Department of Health and Human Services, 24 *Children Today* 1 (1997). For millions of male-headed single parent families, the Government's assertion that "enforcement to financial obligations [against mothers] is not a significant issue," Resp. Br. at 25, is simply false. Indeed, the domestic child support law cited by the Government in support of its position that fathers alone may be permissibly targeted for such enforcement is gender-neutral, not gender-specific, and thus provides no justification for the gender-based regime that the Government now defends. See, *e.g.*, *Blessing v. Freestone*, 117 S.Ct. 1353 (1997).

The Government also cites as "typical" the example of an American man briefly overseas on temporary military duty, who sires a child out-of-wedlock with an alien woman. Resp. Br. at 29 n. 16. The implication of the

Government's argument is that generalizations based on this "typical" scenario constitute a valid basis for according rights and benefits to citizens and their out-of-wedlock children, and for concluding that affected men and women citizens are not "similarly situated." Again, the Government's assumptions are sadly out of date. While at the time Section 309 was adopted, women made up only a tiny fraction of the military, by 1996, women constituted 13.3 percent of all active-duty U.S. military personnel. *More Fighters in the Force are Women*, U.S.A. Today, March 11, 1997, 5A. Indeed, these numbers are growing: 20 percent of the recruits who enter military service are women. James Brooke, *New Attention to Women in Military*, New York Times, March 3, 1997, A10. Further, women, like military men, are frequently stationed abroad. Olympia Snowe, *Alongside Men*, The Washington Post, May 17, 1997, A23. Indeed most United States citizens residing abroad – civilian and armed forces combined – are female. United States Department of Commerce, Bureau of Census, Population Paper Listing 57, Appendix B (1997).

In an astonishing argument that could, if given credence, be used to justify a wide range of discriminatory practices both abroad and domestically, the Government next argues that concerns about "statelessness" arising from the sex-specific citizenship laws of other countries requires children of U.S. citizen mothers be treated more solicitously than children of citizen fathers. Resp. Br. at 33-34. However, the problem of statelessness certainly does not provide an important or even rational basis for across-the-board gender based discriminatory treatment of citizens and their children.

The government could easily address the potential problem of statelessness in a non-discriminatory manner. As noted, *supra*, that potential problem supports remedial expansion. It does not justify discrimination. The Government should do what the Court has repeatedly told it to do, treat people as individuals rather than identify them according to gender based, outdated stereotyping. See *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

Finally, it is quite clear the Government lacks not only a factual justification for the stereotyping in this case, but also can cite no case law that would justify the stereotyping. Its citation of *Schlesinger v. Baird*, 419 U.S. 498 (1975), Resp. Br. at 29, distorts that case (which rested on the regulations creating different career paths for women and men in the military) beyond recognition. Decided in the early days of gender-based equal protection clause jurisprudence, *Schlesinger* applied only a rational basis review to uphold sex-based distinctions. While the Government selectively cites *Lehr v. Robertson*, 463 U.S. 248 (1982), in support of differential treatment of unmarried fathers, it ignores the Court's unequivocal statements that "these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated, with regard to their relationship with the child." *Id.* at 267. In this case a child whose citizen mother had established ties identical to those of Mr. Miller, would easily meet the gender-specific requirements of Section 309(a). But because Ms. Miller's citizen parent was male, she cannot meet the requirements. Gender alone is the deciding factor in determining Ms. Miller's eligibility under Section 1409. This scheme

violates the Equal Protection requirements of the Due Process Clause.

CONCLUSION

The Petitioner respectfully requests the Court to reverse, in part, the judgment below and declare the statute in question unconstitutional.

Respectfully submitted,

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